Supreme Court, U. S.
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MAY 31 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 77-1716

HARRY NEIL KELLY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The petitioner, Harry Neil Kelly, respectfully requests that a writ of certiorari be issued to review the judgment and order of the United States Court of Appeals entered on.

OPINIONS BELOW

On February 20, 1976, petitioner was found guilty by a jury. He was sentenced to one to three years and is still free on bond pending appeal. The statutes involved are Title 18 U.S.C. § 371 and § 2314. On May 10, 1978, the appeal was denied. This petition followed.

JURISDICTION

This Court has jurisdiction because this writ is filed within 30 days of the final appellate decision.

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error when it refused to declare a mistrial after granting a motion for judgment of acquittal on the co-defendant and petitioner was unable to subpoena an exculpatory witness?

2. Whether there was sufficient evidence to justify the case going to the jury and cumulatively does the newly discovered evidence coupled to the lack of evidence before justify a remand, hearing, and trial?

STATEMENT OF THE FACTS

In 1969, an offshore mutual fund, Allied Fund for Capital Appreciation (hereinafter A.F.C.A. or the Fund) was legally chartered and incorporated in Panama (TR. 371), and established its headquarters in Munich, Germany. (TR. 471). The Fund would operate by taking consideration from investors and issuing shares of A.F.C.A. in return. (TR. 182). This Fund maintained broad privileges in how the money should be invested on behalf of its shareholders. (TR. 184). The actual purchase of A.F.C.A. shares were effected through securities brokers throughout the world who would then funnel the money into several exclusive dealers located in Switzerland, Lichenstein, and Germany. A.F.C.A. and these exclusive dealers, Global Distributors, Select Distributors, Select Transfers Ltd. *et. al.* were operated and controlled by the same cast of characters, C. Bennett, Nicholas Gravestyn and Eleanor Smith. (TR. 70, 71 and 539, 40).

From the fund's inception, these individuals held complete control over the purse strings and could withdraw money or assets held by the Fund and the exclusive dealers (TR. 540, 584); whereas, the petitioner

never had any control over the Fund's assets. (TR. 544).[1] Those who had control abused the power and manipulated the assets to their own advantage often without consulting each other, as was related by the A.F.C.A. auditor. (TR. 593, 6). In fact, C. Bennett would remove A.F.C.A. funds and send them to his brother in Canada (TR. 605), and did take other A.F.C.A. funds and transferred them for use in yet another enterprise, Midas, (TR. 741) which was controlled and operated by Bennett. (TR. 741). Director Eleanor Smith commingled the funds of A.F.C.A. and the dealership she controlled (TR. 629) exacted for her personal use. (TR. 659). Even legal counsel for the Fund could not resist the temptation to deal with A.F.C.A. funds, when he unilaterally issued $230,000 to American Express in 1970. (TR. 648). Again, the auditor knew this from personal knowledge, that the payment of $230,000 was made without authorization, and from A.F.C.A. (TR. 650). The appellant, when first appraised of the unauthorized American Express pay off, blanched and became very upset (TR. 649, 50), and maintained that the whole transaction was a great impropriety. (TR. 649). The petitioner made this feeling known to one of the trinity, Gravesteyn. (TR. 649).

The base line of the auditors testimony being that the directors individually looted the funds they controlled and A.F.C.A. (TR. 652-59).

There were sums of money held by A.F.C.A. in several banks (TR. 694 and 1322) and that only trinity of directors had authority to withdraw the funds from the several banks. (TR. 695). These funds were incorrectly administered by these directors. (TR. 710).

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[1] The issue of control of the A.F.C.A. fund will be briefed *infra*.

Throughout the testimony, those closest to the fund maintained that the petitioner did not have knowledge of the clandestine looting occurring in Europe (TR. 703), and that his sole role in A.F.C.A. business was that of advisor. (TR. 702-1281).

Further, the petitioner did not have control over A.F.C.A. disbursements, and *never* issued a check or signed a check for A.F.C.A. (TR. 644), nor did he have any authority at any of the banks to withdraw funds (TR. 1323), and neither was the petitioner involved with any of the exclusive dealers in A.F.C.A. shares. (TR. 1341).

The government relies primarily upon one witness, Schreiber, to establish their case against the petitioner and his co-defendant, who was released from the case upon the judge granting a motion for judgment of acquittal. (TR. 1492, 93). The major government witness against the defendant and Ponsoldt, is a manifestly weak character with several flaws, and one whose testimony resembles the chameleon, in that, it changes colors depending upon circumstances and surroundings. A person whom, per force, even the government admits is most likely to initiate a stock swindle. (TR. 1723-24).

Schriber testified to a myriad of things at different points in time, most, incongruous with each other, or at a very minimum, controverted by subsequent witnesses.

Schreiber, stated that he saw the petitioner and another, Pitman, together in June 1970, falsely listing various securities in the A.F.C.A. prospectus. (TR. 90, 91). Pitman, an accountant for over twenty years (TR. 1616), was engaged by the petitioner to check

A.F.C.A. accounts (TR. 1620), but the books were never tendered for his inspection (TR. 1627), because the trinity refused. (TR. 1628). Pitman even advised the petitioner, in early 1970 to withdraw from A.F.C.A. (TR. 1629). As to Schreiber's allegations, Pitman denied ever engaging in the conduct described, and to his knowledge neither had the petitioner. (TR. 1623, 24).

Schreiber also stated that the petitioner signed the name of Karl Jaeger to certain A.F.C.A. shares (TR. 123-24) (Karl Jaeger—the nominee of the fund as a person authorized under Panamian law to issue shares (TR. 213) tendered to him. This statement was given even though he did not see the signing. (TR. 307, 313). An expert document examiner compared the petitioner's signature and the signature on the shares and concluded that the signature was not that of the defendants. (TR. 1559, 64).

Schreiber stated that the petitioner placed ads in the Herald-Tribune, a financial paper, which quoted the funds selling price per share (TR. 214), albeit he never saw the petitioner place the ads. (TR. 214). Yet, the attorney for the fund stated that C. Bennett had something to do with placing the ads in the Herald-Tribune (TR. 1324); and the auditor of the fund stated, that the trinity definitely placed the ads. (TR. 546). No mention of the petitioner as being responsible for these ads by anyone intimately involved with the fund in Europe, and the Herald-Tribune is a paper published in Europe ,where the directors of A.F.C.A. had their headquarters.

The main government witness often took both sides of the same question, for example, when asked if the

petitioner ever expressed that A.F.C.A. was a fraud, Schreiber responded on 23 May 1973 that the petitioner never expressed that A.F.C.A. was a fraud. (TR. 216). At trial Schreiber stated that the petitioner did state it was fraud. (TR. 215).

At trial, witness Schreiber stated that the assets of A.F.C.A. were handled by the petitioner, (TR. 270) which is a very disputible statement and can not be reconciled with what other witnesses closer to A.F.C.A. have stated; but even Schreiber said as much on 1 June 1973 to government's agents, when he said C. Bennett handled the bulk of the assets. (TR. 278). Further, on 11 June 1973, Mr. Schreiber named all the persons who used the funds of A.F.C.A. for federal agents (TR. 265, 66), and this list did *not* include the petitioner. Again, in one breath he would state the petitioner took no consideration for A.F.C.A. shares (TR. 203), and yet on 23 May 1973, he made a contrary statement. (TR. 203). He stated that he inspected A.F.C.A.'s books (TR. 187-89) and it revealed that the petitioner did not intertrade with A.F.C.A. assets, he contradicts himself (TR. 283) later on in his testimony.

The main government witness had other problems. His testimony came as a result of a deal worked out which would grant Schreiber immunity and earn him an early release from his one year sentence (TR. 350-70) which he earned by pleading.

The directors of A.F.C.A. looted the funds (TR. 652-59). The petitioner was not a director, merely as advisor (TR. 652-59), the petitioner was not a director, merely an advisor (TR. 702, 1281), without any au-

thority to control or manipulate the assets (TR. 1323) of the A.F.C.A. This major shortcoming, coupled with the petitioner's apparent lack of knowledge that looting was occurring in Europe (TR. 703), makes him an unlikely conspirator, and less palpably, the devisor of the scheme to defraud by using "worthless" A.F.C.A. stock; especially when large sums of money were at one point extant and clandestinely diminished, without the appellant's participation or knowledge.

The Bloomfield exchange was initiated, transacted and consumated without the merest participation of the petitioner.

In early June 1970, the Vice President of Acquisitions for Bloomfield, Robert Freund, met Ponsoldt in Miami (TR. 864) to discuss an exchange of assets. Ponsoldt desired to arrange for the exchange of 200,000 shares of A.F.C.A. (TR. 865), for 600,000 shares of the financially beleaguered Bloomfield. (TR. 946-47). The transfer of A.F.C.A. stock was through Die Firma Besenbruch, a corporation owned by Ponsoldt. (TR. 974-75). Ponsoldt stated that the value of A.F.C.A. shares tendered was $2,400,000 (TR. 867) and that the portfolio of investments comprising A.F.C.A. assets were "Blue chip" stock, listed on the New York Stock Exchange (TR. 868), valued at $20,000,000. (TR. 868). Following this initial period of negotiation, a second meeting transpired on 27 or 28 June 1970, at the Brilund Yacht Club, Bahama. (TR. 1057). According to Mr. Bloomfield, third parties contacted the Bloomfield organization regarding the subject transaction, not Ponsoldt. (TR. 1057).

Subsequent to the Bahamas meeting, attorneys for Bloomfield and Ponsoldt met in Miami to memoralize

the negotiations in a contract. At no time was a representative of A.F.C.A. present during the negotiations. (TR. 1088, 89). The contract contained a clause which recited that the A.F.C.A. shares were restricted, and could not be redeemed until April 1971. (TR. 1091, 92). This was confirmed by Bloomfield personally when he went to Germany and consulted with A.F.C.A. officials. (TR. 1091, 92). Ponsoldt related that these restrictions were not binding upon Bloomfield (TR. 875, 977), and over Bloomfield's attorneys advice, the written restriction was incorporated into the contract. (TR. 875, 976, 1212, 1213) (Contract restrictions on redemption are at TR. 1232). On 9 October 1970, Ponsoldt was made President of Bloomfield and Chairman of the Board of Directors. (TR. 1069). After the exchange of assets and prior to 4 November 1970 meeting, the Bloomfield organization had grave problems redeeming the A.F.C.A. shares, therefore the 4 November meeting in Miami was held. This meeting represents the first appearance of the petitioner, and Mr. Freund states that the petitioner did not participate in the negotiations. (TR. 885). Mr. Bloomfield states the petitioner never held himself out as the head of A.F.C.A. The petitioner did tell Mr. Bloomfield to contact A.F.C.A. in Europe to determine if the fund would redeem the share in spite of the restrictions. (TR. 1100, 1174). The petitioner's sole contribution to the 4 November meeting was to inquire if Bloomfield would take .50 on the dollar. (TR. 885). It is interesting, if not at odds with the government's assertion of a fraud or scheme, exchange of worthless stock, that the A.F.C.A. offered a four million dollar loan to Bloomfield while negotiations for the shares redemption were still viable. (TR. 1362).

ARGUMENT

I.

The Court Erred In Denying The Mistrial Motion re The Sudden Absence Of A Key Witness.

It was error for the Trial Judge to grant co-defendant's Ponsoldt's Motion for Directed Verdict of Acquittal (T. 1492) without granting a continuance so that petitioner could subpoena for his defense acquitted co-defendant, Ponsoldt. In *United States* v. *Roca-Alvarez,* (CCA 5) 415 F.2d, 843, this Court held it not to be error not to grant a continuance when there was nothing in the record to indicate that defendant wished to call co-defendant in his behalf. The Court held in this case that a subpoena instanter should have been used to require attendance of the witness. Petitioner attempted to have acquitted co-defendant, Ponsoldt, subpoenaed and such was brought to the attention of the Trial Judge. (T. 1510, 1523, 1557, 1558, 1652, 1673, 1675, 1727, and 1770) Counsel moved for a continuance near the end of Petitioner's defense in order that additional time could be allowed to obtain the attendance of Ponsoldt. (T. 1769) The Trial Court denied petitioner's request for continuance, (T. 1771) and the Court took the position that Petitioner could have subpoenaed his former co-defendant while there at the Courthouse. (T. 1770) That a defendant cannot call his co-defendant for the purposes of cross examination is well embodied in American Law, *United States* v. *Ellsworth,* 481 F.2d, 864, as to do such would be in violation of his co-defendant's Fifth Amendment rights. Petitioner's right and opportunity to subpoena his former co-defendant did not mature until co-defendant's acquittal upon which co-defendant immediately left the Courthouse without giving Petitioner

an opportunity to request a subpoena be issued. To what extent any action by the Petitioner would have been fruitful at that time is speculative in view of the policy of the local marshal's office requiring three (3) days notice before a subpoena could be issued. (T. 1557) In *Scott* v. *United States,* 263 F.2d, 398 (1959), the Court held that where a co-defendant no longer in jeopardy had been subpoenaed in the proper fashion, had agreed to be present, that there was no evidence to indicate postponement of trial was sought for delay or that defendant was not surprised at non-appearance of witness, then it was error to deny a continuance under those grounds when the subpoenaed witness did not appear. Petitioner advised the court at the beginning of his defense that he was issuing the subjoena for Ponsoldt (T. 1523) Petitioner later advised the Court on the same day, that the U.S. Marshal's office had refused to accept the subpoena for Ponsoldt from Petitioner's Trial Attorney indicating that they must have at least three (3) days notice prior to any subpoena being served. (T. 1557) This matter was looked into by the Court and apparently the subpoena was issued for Ponsoldt. The next morning Petitioner's Trial Attorney advised the Court that the Marshal's office had not yet located Ponsoldt. (T. 1652) Later in the trial when the government was faced with problems of stipulations of authenticity of evidence the Court commented that it assumed that it was going to be faced with the problem of sending a Marshal out to get Ponsoldt or to postpone the trial. (T. 1673 and 1675) The problem of subpoening Ponsoldt was once again brought to the Court's attention, (T. 1727) and the fact that the trial counsel for Petitioner was reissuing the subpoena for Ponsoldt. Petitioner moved for continuance of the trial until Ponsoldt could be subpoenaed (T. 1769) but such

continuance was denied by the Court. (T. 1770). Appellant contends that the case at bar is similar to *Scott* v. *U.S.,* supra, in that Appellant made every possible effort to implement the machinery of the Court to assure Ponsoldt's attendance as required by *United States* v. *Harris,* 436 F.2d, 775. Petitioner contends that the failure of the Court to grant a continuance until Ponsoldt could be subpoenaed for attendance resulted in actual prejudice to Petitioner's case in that much of the testimony of Schreiber, Bloomfield, Freund and Clapp could have been contradicted and the actual discussions between Ponsoldt and Bloomfield, before the June 28, 1970, meeting could have been developed showing that Bloomfield had actual knowledge that the AFCA shares were restricted before he made any movement in commerce and that Bloomfield agreed not to attempt to redeem the shares prior to April, 1971, *Baker* v. *United States,* (1968) 393 F.2d, 604. Petitioner further contends that the record reflects that the necessary predicate for the granting of a continuance of this sort was there. *Leino* v. *United States,* 1964, 338 F.2d, 164.

II.

The Cumulative Lack Of Evidence At Trial Plus Newly Discovered Evidence Justifies A New Trial.

The evidence adduced at the trial is insufficient to support a conviction of Appellant on Count 1 of the indictment which charged him with the substantive offense set out in 18 U.S.C.A. 2314 in that he, along with Co-Defendant, Ponsoldt, and others entered into a device or scheme to defraud and obtain money or property in the jurisdictional amount from Harry Bloomfield and Bloomfield Building Industries (here-

inafter referred to as BBI). The indictment charges that false representations were made to Harry Bloomfield and BBI, to wit: (a) A.F.C.A. shares were not restricted, (b) A.F.C.A. could be redeemed on seven (7) days notice to the fund, (c) A.F.C.A. was a successful and reputable fund, (d) A.F.C.A. had extensive and valuable assets consisting of stocks listed on the New York Stock Exchange, and (e) 200,000 shares of A.F.C.A. were worth $2,400,000.00. The indicement further alleges that as part of the scheme, A.F.C.A. was organized under the laws of Panama in 1969 and advertised assets valued in excess of $19,000,000.00, that Ponsoldt obtained from Petitioner shares of A.F.C.A. to be used to obtain assets and that Ponsoldt did obtain such assets, and that on June 27, 1970, in the Southern District of Florida, Petitioner and Ponsoldt by fraudulent pretenses caused Harry Bloomfield to be and did transport Harry Bloomfield from Memphis, Tennessee, to Miami, Florida, to defraud him of property valued at more than $5,000.00.

In *Thogmartin* v. *U.S.,* 313 F.2d, 589, 594 (2, 3) the Court stated:

> It is not necessary that it be shown that the transportation was effected by defendant personally. It is enough if the evidence justifies a conclusion that he was a motivating force in the transportation.

But there must be evidence that Petitioner was a motivating force, and here there is none.

In contemplation of the second paragraph of 18 U.S.C.A. 2314, Bloomfield did not move in interstate commerce, but moved in foreign commerce. All paragraphs, except the second paragraph, the paragraph imposing penalties, and the exclusionary paragraph,

provide that the violations named therein involve *interstate or foreign commerce.* However, the second paragraph of the Code Section limits itself to *interstate commerce.* See *Londos* v. *U. S.,* 240 F.2d 1, *Rogers* v. *U. S.,* 334 F.2d 83. and *Charron* v. *U. S.,* 412 F.2d 557. *Charron,* supra, points out that the Petitioner in that case has knowledge that the victim would have to travel in interstate commerce if Petitioner's scheme were to succeed, a scheme whereby Petitioner convinced the victim to travel from Mexico City, Mexico, to Washington State, via Oregon, to pick up $50,000.00 to bring back to the defendant in that case.

Considering element (2) of the crime set out in the second paragraph of 18 U.S.C.A. 2314, there is no evidence that Petitioner was doing anything in execution or concealment of a scheme.

Considering element (4) of the substantive offense, there is no evidence that prior to the movement of Bloomfield from Memphis to Nassau, Petitioner had devised any scheme or artifice or intented to devise same for the purpose of obtaining money or property by means of fraudulent pretenses, representations, or promises.

Indeed, there is no evidence of a scheme or artifice. The government attempted to show such scheme or artifice as outlined in Subsections (a-e) of Section 1 of the indictment. However, the evidence shows, without equivocation, that the A.F.C.A. shares were restricted and that both Bloomfield and Ponsoldt knew it, no one but Ponsold having stated that the A.F.C.A. shares could be redeemed in seven (7) days, a factor over which Petitioner had no control, and that A.F.C.A. was a successful fund as testified to by Cohen

that, at the time of the BBI-A.F.C.A. stock swap, A.F.C.A. paid all of its debts and redeemed all shares ripe and presented for redemption. On the other hand, there is no evidence that the 200,000 shares of A.F.C.A. were not worth $2,400,000.00, Schreiber having testified that the shares were valued at from $10.00 to $12.50 per share. There is neither evidence that the assets of A.F.C.A. did not have a value of $19,000,000.00, nor evidence that A.F.C.A. did not own shares of entities listed on the New York Stock Exchange.

There is no evidence that Harry Bloomfield would not have been able to redeem the 200,000 shares of A.F.C.A. if they had not been restricted. The opinion of Bloomfield's attorney, Clapp, that the restriction did not apply to Bloomfield was a legal opinion upon which Bloomfield relied.

Counsel intends to supplement the argument herein at a later date with evidence to support our contention that the cumulative lack of evidence and newly discovered evidence justify a reversal and remand for a new trial. Said supplemental brief, with the Court's approval, will show clear evidence that the mutual fund which petitioner supposedly bled dry is still worth over one million dollars.

CONCLUSION

Wherefore, it is respectfully requested that the instant Petition for Writ of Certiorari be granted.

Very respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES

No.

HARRY NEIL KELLY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent,*

Affidavit of Petitioner for Writ of Certiorari

DISTRICT OF COLUMBIA: ss.:

DISTRICT OF COLUMBIA) ss.:

I, HARRY NEIL KELLY, do hereby attest and swear that the petition for writ of certiorari filed this day by my counsel in the Supreme Court for the United States of America is filed in good faith and with the firm belief that the issues raised by counsel are issues which should necessitate a reversal of my present conviction before the Federal Court for the Southern District of Florida.

/s/ HARRY NEIL KELLY

APPENDIX B

Affidavit of Petitioner's Counsel

I, Kenneth Michael Robinson, hereby attest and swear that I was retained within the past two weeks in this matter and that this Petition is filed in good faith.

/s/ Kenneth Michael Robinson
Kenneth Michael Robinson

Subscribed and sworn to before me this 10th day of May, 1978.

APPENDIX C

A copy of the opinion of the 5th Circuit will be provided in the near future.

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SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

On May 31, 1978, counsel filed a Petition For *Writ of Certiorari* to this Court. At that time the petition was filed absent certain requirements including one crucial argument due to the fact that the order of commitment signed by Judge Fay of the United States Court of Appeals for the Fifth Circuit[1] required the petition to be filed no later than May 31, 1978, lest the petitioner need to have surrendered to the U.S. Marshal in Washington, D.C. by 9:00 A.M. on June 1, 1978. The pertinent facts are:

1.) On March 20, 1978, the Fifth Circuit Court of Appeals in No. 76-2236 affirmed the judgment

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[1] Judge Fay was the trial judge at the time of Mr. Kelly's conviction. Consequently, he signed the orders referred to herein.

at trial. A copy of that opinion is included herein as Appendix "C".

2.) On May 10, 1978, the Court of Appeals for the Fifth Circuit denied the petitioner's motion for leave to file a supplemental brief for rehearing *en banc* but granted petitioner's motion for an extension of time till May 10th to file such a brief. The result is that the final decree from the Fifth Circuit runs from May 10th and not March 20, 1978.[2]

3.) On May 26, 1978, Judge Fay signed an Order of Modification of Mandate which is attached hereto as Appendix "D".

4.) On May 31, Judge Fay signed an Order Staying Mandate which is attached as Appendix "E". That Order is the last order entered from the lower courts.

SUPPLEMENTAL ISSUE PRESENTED UNDER ARGUMENT II OF PETITION FILED MAY 31, 1978

Did the court of appeals erroneously conclude that there was sufficient evidence produced at trial to prove petitioner controlled AFCA and stole its assets when there is evidence of extraordinary assets still in AFCA and of petitioner's non-control of said funds which should have ben presented at trial and did failure to present said evidence constitute ineffective assistance of counsel?

ARGUMENT

Appellant was not effectively represented at trial. A review of the opinion of the court of appeals does

[2] Previously counsel neglected to file certain options after the ruling, Appendix C; however, assuming *arguendo* that the time for filing the Supreme Court petition runs from March 20, 1978, this Court still has jurisdiction, per ——— v. ———, ———.

much to confirm counsel's argument. Petitioner's counsel is presently in the third week of a four week stock-fraud trial in the Southern District of New York City, New York. Counsel cannot fully brief this issue for at least three weeks. Consequently, a supplemental petition will be required in this case.

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APPENDIX

APPENDIX C

No. 76-2236

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

HARRY NEIL KELLY, *Defendant-Appellant.*

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

March 20, 1978.

Defendant was convicted in the United States District Court for the Southern District of Florida, at Miami, Peter T. Fay, J., of causing and conspiring to cause a person to travel in interstate commerce in execution of a scheme to defraud, and he appealed. The Court of Appeals, Gewin, Circuit Judge, held that: (1) there was sufficient evidence for jury to conclude that offshore mutual fund chartered by defendant was fraudulently created for purpose of defrauding investors; (2) there was sufficient evidence to satisfy requirement of travel in interstate commerce; (3) it was not necessary that defendant had caused the transportation directly, and fact that he acted through innocent intermediary did not immunize him from guilt; (4) it was not necessary that defendant specifically intended to cause movement in interstate commerce; (5) there was no requirement of specific intent to defraud a particular individual; (6) there was no abuse of discretion in refusing to grant continuance until codefendant, who had been granted judgment of acquittal the previous day, could be served with a subpoena and (7) there was no error in permitting testimony of certain attorney despite contention that he should have been barred from testifying because of attorney-client privilege.

Affirmed.

1. Criminal Law

Where sentences of three years imposed on each of three counts were to run concurrently, if evidence was sufficient as to any one count, it was not necessary for the Court of Appeals to consider the remaining counts.

2. Fraud

In prosecution for causing and conspiring to cause a person to travel in interstate commerce in execution of a scheme to defraud, there was sufficient evidence for jury to conclude that offshore mutual fund chartered by defendant was fraudulently created for purposes of defrauding investors and that its shares were worthless or nearly so. 18 U.S.C.A. §§ 2, 371, 2314.

3. Commerce

In prosecution for causing person to travel in interstate commerce in execution of a scheme to defraud, evidence that person in question, in traveling from Memphis to the Bahamas, stopped overnight at Miami was sufficient to satisfy requirement of travel in interstate commerce. 18 U.S.C.A. § 2314.

4. Commerce

To constitute offense of causing a person to travel in interstate commerce in execution of a scheme to defraud, it is not necessary that defendant specifically intended to cause movement in interstate commerce, that he had knowledge of victim's travel in interstate commerce, or that such travel was foreseeable. 18 U.S.C.A. § 2314.

5. Commerce

Under statute declaring it an offense to cause a person to travel in interstate commerce in execution of a scheme to defraud, defendant need not have caused the transportation directly and the statutory requirements are fulfilled

if it is shown that he was a motivating force in the transportation. 18 U.S.C.A. § 2314.

6. Commerce

Where there was substantial evidence that defendant devised a scheme by which worthless mutual fund shares were used to obtain cash or other valuable assets, that he transferred thousands of those shares to second person which the latter then offered to third person in exchange for valuable assets and which induced third person to travel in interstate commerce, fact that defendant acted through an innocent intermediary did not immunize him from guilt for causing person to travel in interstate commerce in execution of a scheme to defraud. 18 U.S.C.A. § 2314.

7. Fraud

Statute proscribing causing a person to travel in interstate commerce in execution of a scheme to defraud does not require specific intent to defraud a chosen individual, but only a general intent to defraud any person who might fall victim to schemer's plan, and thus there is no requirement that the Government prove that defendant specifically intended to defraud the individual who was allegedly induced to by the scheme to travel in interstate commerce. 18 U.S.C.A. § 2314.

8. Fraud

In prosecution for causing a person to travel in interstate commerce in execution of scheme to defraud, there was sufficient evidence to support finding under one of the courts of the indictment that defendant intended to defraud the particular person who was allegedly induced to travel in interstate commerce pursuant to the scheme. 18 U.S.C.A. § 2314.

9. Criminal Law

There was no error in failure of trial court to sua sponte charge on accomplice testimony, where the Government's case consisted of testimony by persons who were not accomplices as well as testimony of persons who may have been accomplices, and where trial court provided jury with instructions on the testimony of witnesses which were adequate in the circumstances.

10. Conspiracy

Conspiracy conviction requires only that one of the conspirators knowingly committed one of the overt acts charged in the indictment, and it is not necessary to find that defendant committed one of the overt acts. 18 U.S. C.A. § 371.

11. Criminal Law

Trial court did not abuse discretion in refusing to grant continuance until codefendant, who had been granted judgment of acquittal the previous day, could be served with a subpoena, where defendant could have served codefendant immediately after the acquittal and failed to do so, where defendant provided court with no reasons why codefendant's testimony was critical to his case, and where he made no showing that codefendant could ever be served or if served would be willing to testify.

12. Criminal Law

General rule, especially in conspiracy cases, is that persons jointly indicted should be tried together and severance should not be granted absent a showing of the most compelling prejudice.

13. Criminal Law

Even asuming that defendant's alleged motion to sever was made, its denial would have been proper despite con-

tention that denial prevented codefendant from testifying in defendant's behalf, where, upon granting of codefendant's motion for judgment of acquittal, he was subject to subpoena yet defendant failed to act until he was absent.

14. Witnesses

In order to invoke attorney-client privilege, claimant must establish that the asserted holder of the privilege is or sought to become a client; that the person to whom the communication was made is a member of a bar of a court or a subordinate and in connection with the communication was acting as a lawyer; that the communication relates to a fact of which the attorney was informed by his client without the presence of strangers for the purpose of securing primarily either an opinion on law or legal services or assistance in some legal proceeding, and not for the purpose of committing a crime or tort, and that the privilege has been claimed and not waived by the client.

15. Witnesses

Trial court did not err on ground of attorney-client privilege in permitting attorney's testimony where, beyond fact that attorney testified that he was a member of the bar and was employed as an attorney by allegedly fraudulent mutual fund established by defendant, no evidence was presented of any attorney-client relationship between defendant and such attorney.

16. Criminal Law

In prosecution of defendant for causing and conspiring to cause a person to travel in interstate commerce in execution of a scheme to defraud, question asked by prosecution on redirect of its auditor-witness as to whether defendant could have sold certain unregistered stock in the United States without proper authority did

not warrant mistrial on grounds that the prosecution had placed defendant's character in issue, since question did not state that defendant committed illegal act, since defendant's counsel explored issue on cross-examination of auditor, who stated that to the best of his knowledge there was no such attempt and since curative instruction was given.

17. Criminal Law

Statement by prosecutor of willingness to stipulate that Government's chief witness was kind of person who would become involved in a fraud was not improper on theory that it placed defendant's character in issue.

18. Criminal Law

Defendant was not prejudiced by Government's inadvertent failure to supply him pursuant to discovery order with copy of document it had decided to introduce at trial, where, on objection, trial court prohibited the Government from placing the document into evidence.

Appeal from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, GEWIN and TJOFLAT, Circuit Judges.

GEWIN, Circuit Judge:

Appellant Harry Neil Kelly was tried by a jury and convicted on all counts of a three-count indictment charging violations of 18 U.S.C. §§ 2314, 2, & 371, in that he caused and conspired to cause a person to travel in interstate commerce in execution of a scheme to defraud.[1] On

[1] William R. Ponsoldt, Kelly's codefendant, was indicted on the same counts. At the close of the government's case Ponsoldt moved for a judgment of acquittal which the court granted.

appeal Kelly challenges (1) the sufficiency of the evidence to support his conviction, (2) the court's failure to charge the jury on accomplice testimony, (3) its refusal to give requested instructions, (4) denial of his motion for continuance, (5) denial of his motion for severance, (6) admission of testimony allegedly barred by the attorney-client privilege, (7) failure to grant a mistrial, and (8) failure of the government to comply with the court's discovery order. Finding his assignments of error without merit, we affirm.

FACTS

In 1969 appellant Kelly chartered an offshore mutual fund, the Allied Fund for Capital Appreciation (AFCA) in Panama. Kelly was the president of the fund which was managed from Munich, Germany. AFCA shares were distributed by a Munich concern called Select Distributors (Select). Kelly worked as an agent for Select, which was managed by a Miss Smith and two AFCA directors, a Mr. Bennett and a Mr. Gravesteyn.[2] Kelly received funds from Select and placed them in Midwest National Bank (Midwest), an institution he had chartered in Panama through an attorney. In Kelly's own words, Midwest was "a proof." (R. 316). The bank's headquarters consisted of an 18 by 24 foot room furnished with some tables and chairs, filing cabinets, a typewriter and Telex machine, and a small refrigerator. Midwest's primary function was to serve as a depository of funds from AFCA's largest shareholder, the KARA trust. The trust, which according to testimony was named for Kelly's daughter Kara and controlled by Kelly as her guardian, received AFCA shares and in turn transferred funds, at least on the books, to Midwest.

[2] Some and perhaps all of these individuals were involved to verying degrees in looting AFCA.

AFCA itself operated by receiving money from investors throughout the world and issuing shares in the fund in return. Investments in the fund were solicited on the basis of prospectuses and financial statements representing that AFCA had millions of dollars worth of blue chip securities.[3] AFCA's assets were allegedly held by Midwest and Drabun, Inc., a New Orleans brokerage firm, according to confirmations furnished AFCA's auditor Eric Gaeckler by Midwest and Drabun.[4] Drabun's owner, Peter Schreiber, however, testified that he had never held assets for AFCA, and that when he received a letter from Select asking him to verify these assets he called Kelly on the matter. Kelly replied that there was "paperwork" at the office of the fund showing that Drabun held the assets, but not to worry about it, that "[t]hey will never surface," that "Mr. Gravesteyn had control of it." (R. 119).

In the late spring of 1970, Gaeckler, in endeavoring to prepare a financial statement for the fund, discovered that all of its assets had been transferred to Midwest.[5] The

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[3] Peter Schreiber, the government's chief witness, testified that the portfolio of stocks listed in AFCA's financial statement of March 31, 1970, was a false portfolio; stocks listed in it had been selected at random from the financial section of a paper by Kelly, his accountant Tony Pitman, and Schreiber (R. 94-95).

[4] A confirmation consists of a request by a company to the person or entity holding its assets to confirm that holding of assets to the auditor. (R. 474).

[5] On November 12, 1970, a letter was mailed to Drabun from Select, requesting Drabun to confirm to Gaeckler the assets held by Drabun for AFCA as of September 30, 1970. (Gov. Exh. 4). On November 30, 1970, Schreiber replied in a letter dictated by Kelly that Drabun was not holding any securities for AFCA. (Gov. Exh. 5). Schreiber testified that Kelly told him: "As you know, you are not holding any collateral for AFCA. Therefore, I have got to move it so that the German group will have the continuity of these supposed assets, and I am going to switch them down to assets." (R. 135).

following spring Gaeckler travelled to Panama to audit the assets allegedly held by Midwest and found nothing but a sparsely furnished room. Upon this discovery he notified Select to stop all transactions and redemptions involving AFCA. Gaeckler subsequently met Kelly in Mexico City and confronted him with what he had learned in Panama. Kelly informed him that AFCA's assets were located in a Mexico City bank. Gaeckler visited the bank and requested a written confirmation of the assets. He never received a confirmation and eventually discovered that only a few thousand dollars remained to the credit of the fund.

This case arose out of a transaction between Kelly and William R. Ponsoldt in April of 1970, in which 200,000 shares of AFCA were exchanged for all the shares in Ponsoldt's Schweiz-Deutsch Land Company (SDL).[6] SDL purportedly held 160 acres of property in New Jersey and a substantial amount of securities. Apparently AFCA never received the property but received shares in a company of questionable worth called Computronics. The AFCA shares were restricted from redemption for one year.

On June 28, 1970 Ponsoldt met with Harry Bloomfield, president and owner of a controlling interest in Bloomfield Building Industries (BBI), a corporation listed on the American Stock Exchange, at the Brilund Yacht Club in the Bahamas to discuss a trade of AFCA shares for Bloomfield's controlling interest in BBI. Bloomfield travelled to this meeting by plane, flying from his home in Memphis, Tennessee, to Miami, Florida, where he spent the night. The next day he met Ponsoldt in Nassau and together they flew to the yacht club.

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[6] The stock in Schweiz-Deutsch was owned by Die Firma Besenbruch which was in turn owned by Munchen-Nassau Trading Co., Ltd.; all companies owned by Ponsoldt.

Under the terms of the trade, which had been worked out in advance of this meeting, Bloomfield was to receive approximately $2,400,000 in AFCA stock plus cash or another asset agreeable to him in return for Bloomfield's shares in BBI. Bloomfield, however, was concerned about the restriction on the redemption of the AFCA shares. Ponsoldt assured Bloomfield that the restriction only applied to Ponsoldt, not to third party purchasers of the stock, and stated that Bloomfield could redeem the AFCA shares in seven days at the market price. Satisfied with Ponsoldt's answer, Bloomfield concluded the contract.

Bloomfield subsequently attempted to redeem the AFCA stock but was unsuccessful.[7] On November 4, 1970, he travelled from Memphis to Miami for a meeting with Ponsoldt to resolve the problem of the redemption of the AFCA shares. Present at this meeting was Kelly, whom Ponsoldt introduced as the head of the AFCA fund. When Bloomfield demanded that either the AFCA shares be redeemed or the deal be rescinded, Kelly remarked that generally when one tried to cash in stock prior to the redemption date one could only get fifty cents on the dollar. Bloomfield replied that he might accept that arrangement. Kelly and Ponsoldt then left the room to discuss the proposal. When they returned, Bloomfield was told that they would have to contact the "people" in Germany and was assured that they would get in touch with him later. No reply was ever forthcoming from Germany. In May of 1971 Ponsoldt and Bloomfield rescinded their agreement and made a settlement agreement.

I. Sufficiency of the Evidence

The jury has weighed the evidence and determined the credibility of the witnesses presented by both sides in

[7] There was testimony by AFCA's attorney, Daniel Cohen, that the registrar of AFCA had no record of issuing some of the shares offered by Bloomfield for redemption. (R. 1293).

this case. Taking, as required, the view most favorable to the government, we must sustain the jury's verdict if substantial evidence exists to support it. *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

Appellant challenges the sufficiency of the evidence under Counts I, II and III of the indictment. Both Counts I and II charge violations of 18 U.S.C. §§ 2314 and 2.[8] Section 2314 defines the substantive offense and section 2 defines the offense of aiding and abetting. Count III alleges that appellant conspired to violate section 2314. Since the sentences of three years imposed by the district court on each count are to run concurrently, if we find there is sufficient evidence to support appellant's conviction under any one count, we need not consider the remaining counts. *Hirabayashi v. United States,* 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1942); *United States v. Dumenigo,* 444 F.2d 253 (5th Cir. 1971) (per curiam).

Appellant charges that the government has failed to demonstrate a violation of section 2314. The pertinent provision of 18 U.S.C. § 2314 states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; . . .
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

[8] Counts I and II are largely identical except that Count I concerns Bloomfield's June 1970 trip to meet Ponsoldt, while Count II concerns his journey from Memphis to Miami in November, 1970.

The statute thus requires the devising of a scheme to defraud *any* person of money by false representations and causing or inducing that person to travel in interstate commerce in furtherance of that scheme. Appellant contends that the evidence adduced by the government fails to satisfy these elements of the offense in that it does not show that appellant devised a scheme to defraud Bloomfield and caused Bloomfield to travel in interstate commerce in execution of such a scheme. Initially we turn to an examination of the first element of the offense—the existence of a scheme to defraud.

Appellant primarily contends that there was no evidence that AFCA was not a viable mutual fund and that the shares of AFCA transferred to Ponsoldt were worthless. We believe that there was sufficient evidence for the jury to conclude that AFCA was a fraudulently created mutual fund and that its shares were worthless or nearly so. It was shown at trial that the "bank" which supposedly held the bulk of AFCA's assets was a mere shell corporation consisting of a single room, devoid of either personnel or funds. There was testimony that the securities comprising AFCA's portfolio were compiled by appellant and two others by selecting stock of corporations at random from the financial section of a newspaper. AFCA's prospectus failed to mention Kelly's connection with the fund, yet listed two individuals as directors of the fund who had no connection with the concern and never consented to have their names listed as directors. Assets of the fund were falsely confirmed with appellant's knowledge to AFCA's auditor by Drabun, Inc. Appellant's own knowledge of the worthlessness of the AFCA shares is evidenced by his practice of distributing thousands of shares of AFCA for little or no consideration.[9] But per-

[9] Schreiber, for example, testified that he received 8,000 shares of AFCA from Kelly for providing the fund with advice during a short stay in Germany with Kelly. At the time the stock was quoted at approximately $11 a share. (R. 72-80). According to Schreiber Kelly also distributed AFCA stock to Jerry Yanks, "to do some good with it," to Carmen Lambardosi, who "said he would like to make a hit with it," and Peter Crosby, who told Kelly he could use assets for his company. (R. 97-101).

haps the best indication that AFCA was a sham fund formed by Kelly and others for the purpose of defrauding investors is the fact that when AFCA's auditor tried to locate its purported millions of dollars in assets, he found only a few thousand dollars remaining in the fund.

Appellant also contends that the government failed to satisfy the jurisdictional requirements of section 2314 under Count I of the indictment. The statute requires that a person be induced to travel in interstate commerce in furtherance of a scheme to defraud. Appellant advances the novel argument that Bloomfield in his trip from Memphis to the Bahamas moved not in interstate commerce but in foreign commerce. It is unchallenged, however, under Count II of the indictment, involving Bloomfield's trip from Memphis to Miami in November of 1970 that Bloomfield travelled in interstate commerce. Thus, under Count II the element of interstate travel is satisfied.

Alternatively, we also find that there was sufficient evidence under Count I of the indictment to satisfy the requirement of travel in interstate commerce. The evidence shows that to reach the June, 1970 meeting with Ponsoldt Bloomfield left Memphis, Tennessee, by commercial airline for Miami, Florida, where he spent the night, and then travelled on to the Bahamas. In *Charron v. United States,* 412 F.2d 657 (9th Cir. 1969), the defendants induced their victim to travel from Mexico to Washington State and back to Mexico in furtherance of their scheme to defraud him. En route to and from Mexico City the victim passed through Oregon. The court held that the

evidence presented by the case established that the victim had travelled in interstate commerce.

Appellant attempts to distinguish *Charron* from the instant case on the basis of language in the opinion stating that the defendant "knew that his victim would have to travel in interstate commerce if his scheme were to succeed." *Id.* at 659. Knowledge or foreseeability of a victim's travel in interstate commerce, however, is not a jurisdictional requisite. This issue was resolved in *United States v. Ludwig,* 523 F.2d 705 (8th Cir. 1975), where an examination of congressional intent led the court to conclude that "interstate transportation is merely the linchpin for federal jurisdiction and bears no relationship, in terms of culpability, to the underlying criminal acts which are the objects of § 2314, it [therefore] follows that the government should not have to prove that the interstate transport was in any way reasonably foreseeable." *Id.* at 707.

Appellant also argues that there was no evidence that he specifically intended to cause and caused Bloomfield to travel in interstate commerce. Under section 2314 the defendant need not have caused the transportation directly. The statutory requirements are fulfilled if it is shown that "he was motivating force in the transportation." *Thogmartin v. United States,* 313 F.2d 589 (8th Cir. 1963) (Blackmun, J.). Appellant, however, contends that there was no evidence that he was a "motivating force" behind Bloomfield's travels. The record reveals otherwise. There was substantial evidence that appellant devised a scheme by which worthless shares in AFCA were used to obtain cash or other valuable assets. Appellant transferred thousands of these shares to Ponsoldt which the latter then offered to Bloomfield in exchange for shares in Bloomfield Building Industries, Inc. It was Ponsoldt's offer of the AFCA shares supplied him by Kelly which induced Bloomfield to travel to the Bahamas

via Miami, and it was Bloomfield's desire to redeem these shares which led him to travel to Miami from Memphis.[10]

Appellant further argues that it is not sufficient for purposes of section 2314 to merely show that the defendant induced interstate transportation, it must also be shown that the defendant specifically intended to cause movement in interstate commerce. This argument misapprehends the nature of the interstate transportation requirement of section 2314. This requirement, as stated above, serves as the "linchpin for federal jurisdiction," providing a constitutional basis for the exercise of federal power, *Ludwig, supra,* at 707, and does not mandate that the defendant know, or foresee, or intend any movement in interstate commerce. *United States v. Powers,* 437 F.2d 1160, 1161 (9th Cir. 1971).

In *Ludwig,* for example, defendant drew two checks upon his employer's bank account in Missouri, payable to a friend. Defendant delivered the checks to his friend who deposited them in his personal account in another Missouri bank. The friend's bank mailed the checks to its correspondent bank in Illinois, from whence the checks eventually travelled back to defendant's employer's bank in Missouri. The checks thus moved through interstate commerce. Defendants argued that since the government failed to show that the defendants knew that the checks would move through interstate commerce or even that it was reasonably foreseeable that they would do so, there was insufficient evidence under section 2314 for their conviction. The court, however, held that the statute contained no requirement of reasonable foreseeability of interstate transportation. *Id.* at 708. Thus in *Ludwig,* defendants were convicted under section 2314 even though

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[10] The fact that Kelly acted through an innocent intermediary does not immunize him from guilt. *See United States v. Giles,* 300 U.S. 41, 57 S.Ct. 340, 81 L.Ed. 493 (1937).

they not only did not specifically intend that the checks move through interstate commerce, but lacked even a reasonable expectancy that they would do so.

Appellant's final challenge to section 2314 involves the assertion that the statute requires the government to prove that he specifically intended to defraud Bloomfield, and that it failed to do so. Again, we find that appellant misconstrues the provisions of section 2314. The language of the applicable paragraph of the statute contains no requirement of specific intent to defraud a chosen individual but merely states that a violation occurs when "any person" is caused or induced to be transported in interstate commerce.[11]

This circuit has followed an interpretation of section 2314 which construes the statute to require a showing that "*a victim* was induced to travel in interstate commerce." *United States v. Scoratow*, 434 F.2d 1288 (5th Cir. 1970), *quoting United States v. Hassel*, 341 F.2d 427 (4th Cir. 1965) (emphasis supplied). Further, a construction of section 2314 as requiring only a general intent to defraud any person who might fall victim to the schemer's plan is consistent with the construction placed on that part of the statute concerning movement in interstate commerce—that no intent to cause anyone to move through interstate commerce is required. We therefore agree with the trial judge that the statute only required that "Mr. Kelly established this scheme with the intention of defrauding anyone that happened to come along and was available for the plucking . . . ." (R. 1812).

In addition ot our interpretation of section 2314, we also find that there was sufficient evidence to support a finding

[11] In a case involving the first paragraph of section 2314, interstate transportation of stolen goods, the Second Circuit stated, "It would seem that only a general criminal intent is necessary to violate 18 U.S.C. § 2314." *United States v. DeKunchak*, 467 F.2d 432, 436 (2d Cir. 1972).

under Count II of the indictment that appellant intended to defraud Harry Bloomfield Count II concerns Bloomfield's journey of November 4, 1970, from Memphis to Miami where he met not only with Ponsoldt but with the appellant as well. As noted earlier, at this meeting appellant was introduced, without protest, as "the head of AFCA." Appellant also raised the possibility that the AFCA shares held by Bloomfield might be redeemed at fifty cents on the dollar. When Bloomfield expressed interest in this suggestion, Kelly and Ponsoldt left the room to ostensibly confer on this redemption plan. When they returned, Bloomfield was told that Kelly would have to talk to "his people" in Gemany, and that they would contact Bloomfield later. We believe that this evidence of direct participation by appellant in the meeting with Bloomfield over the issue of the redemption of Bloomfield's AFCA shares constitutes sufficient evidence that Kelly intended to defraud Bloomfield. It is therefore our opinion that there was substantial evidence to support a conviction under either Counts I or II of the indictment.

II. Failure to Charge the Jury on Accomplice Testimony

Appellant asserts as error the trial judge's failure to specifically charge the jury that if they found any of the witnesses who testified to be accomplices of the appellant, their testimony should be carefully scrutinized. In *Williamson v. United States*, 332 F.2d 123 (5th Cir. 1964), this court reversed a conviction where the trial court failed to charge the jury on accomplice testimony even though, as here, the charge was not requested. In *Williamson*, however, the government's entire case rested upon the testimony of a single accomplice. The case before us presents an entirely different situation. Here, the government's case consisted of testimony not only of individuals who may have been the appellant's accomplices but also of testimony by persons who were not accomplices. Also, in the instant case, the trial judge provided the jury with in-

structions on the testimony of witnesses which we believe were adequate in the circumstances. *See United States v. Rodriguez,* 498 F.2d 302, 307-08 (5th Cir. 1974).

III. Refusal to Give Requested Instructions

The trial court refused to instruct the jury that it was necessary to prove that appellant specifically intended to defraud Bloomfield. This refusal does not constitute error, since, as we have held in the first section of this opinion, 18 U.S.C. § 2314 does not require that the fraud be aimed at a specific individual.

Appellant also contends that the trial court erred in refusing to instruct the jury that:

> [I]f you do not find any overt act committed by HARRY NEIL KELLY, in furtherance of defrauding Harry Bloomfield of money or property in excess of $5,000.00, you must find the Defendant Not Guilty. (R. 157).

This instruction concerns the conspiracy count which, as stated above, we have not felt required to rule upon. However, we note that the requested instruction misstates the law, which, as stated by the trial judge, requires that *one* of the conspirators knowingly committed one of the overt acts charged in the indictment. *See United States v. Pearson,* 508 F.2d 595 (5th Cir. 1975); *United States v. Diez,* 515 F.2d 892, 895 (5th Cir. 1975).

IV. Refusal to Grant Continuance

Appellant assigns as error the trial court's refusal to grant a continuance until Ponsoldt could be served with a subpoena. The law in this area has been thoroughly explicated by this court in *United States v. Uptain,* 531 F.2d 1281 (1976). Briefly, the disposition of a request for continuance rests within the trial court's discretion. *Avery v. Alabama,* 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940);

United States v. Gidley, 527 F.2d 1345 (5th Cir. 1976). Absent an abuse of discretion that disposition will not be disturbed on appeal. *United States v. Uptain, supra,* at 1285; *United States v. Miller,* 513 F.2d 791 (5th Cir. 1975). The validity of the trial court's ruling must be decided according to the circumstances presented by each case, with particular emphasis upon the reasons presented to the judge at the time of the denial of the request. *Ungar v. Sarafite,* 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964). In this circuit we have formulated a general rule for review of denials of requests for continuances.

> A movant must show that due diligence has been exercised to obtain the attendance of the witness, that substantial favorable evidence would be tendered by the witness, that the witness is available and willing to testify, and that the denial of the continuance would materially prejudice the defendant.

United States v. Miller, 513 F.2d 791, 793 (5th Cir. 1975).

Appellant first attempted to subpoena Ponsoldt on the morning following the trial court's grant of Ponsoldt's motion for judgment of acquittal. (R. 1523). There was some problem with getting the marshal's office, which claimed it required three days notice prior to service, to accept the subpoena. But the trial judge sent his clerk to expedite service. (R. 1558). The marshal's office, however, was unable to locate Ponsoldt (R. 1652, 1727, 1767-68) who may have been evading service of the subpoena. (R. 1672). After attempting for five days with no success to locate Ponsoldt the defense moved for a continuance. The court denied the motion on the grounds that Ponsoldt could have been served while he was in the courthouse and secondly, that it appeared likely that it would take months to locate him. (R. 1770-71).

In these circumstances we conclude that the trial judge did not abuse his discretion in refusing to grant a continu-

ance. Appellant had an excellent opportunity to serve Ponsoldt immediately after Ponsoldt had been acquitted and failed to do so. Nevertheless, the trial judge did everything in his power to see that Ponsoldt was served. There was evidence that Ponsoldt was unavailable and unwilling to testify *See United States v. Miller, supra.* Counsel for *Kelly* stated that Ponsoldt was deliberately evading service of the subpoena (R. 1672) and that Ponsold'ts attorney had advised Ponsoldt not to testify. (R. 1672, 1770). Appellant's counsel also admitted that it might take months to serve Ponsoldt. (R. 1770). Finally, it appears vice of the subpoena (R. 1672) and the Ponsoldt's attorthat one of the main reasons the defense wanted Ponsoldt present at trial was to authenticate signatures (Ponsoldt and Gravestyn) on two documents defendant's exhibits 37 and 40, which the defense wished to place into evidence. (R. 1671). The government subsequently withdrew its objections to these exhibits and defense counsel replied, "[t]hat solves the problem with reference to Mr. Ponsoldt." (R. 1727). We therefore find that in these circumstances, where appellant in his motion for a continuance provided the court with no reasons why Ponsoldt's testimony was critical to his case and where he made no showing that Ponsoldt could ever be served, or if served would be willing to testify, the trial court did not abuse it discretion in denying appellant's request for a continuance.

V. Refusal to Grant a Severance

Appellant claims that the court erred in denying his motion for severance because that denial prevented him from obtaining the testimony of co-defendant Ponsoldt, whom appellant claims was willing to testify until his judgment of acquittal was granted. This court, however, is at a loss to determine when, if ever, that motion was made. The government has been unable to locate it and appellant in his brief does not furnish a record citation. Appellant's counsel, pursuant to a request by this court at oral argument, has written a letter stating:

> In the original transcript of the trial at page 11, line 23, trial attorney indicates that there is a Motion for Severance pending in this matter. On page 19, line 19, the trial court denies such Motion for Severance.
>
> The trial record is void of any written request for Motion for Severance, yet in the transcript between pages 11 and 19, there is reference to the pending Motion and the government's response thereto.

We have examined that portion of the record cited by appellant's counsel and find that it discloses two separate motions for severance made not by appellant's counsel but by co-defendant Ponsoldt's counsel. There is no indication that appellant's counsel moved for severance at this time or on any other occasion.

However, in the circumstances of this case, even had this alleged motion been made, its denial would have been proper. The denial of a motion for severance is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Opper v. United States,* 348 U.S. 84, 85, 75 S.Ct. 158, 160, 99 L.Ed. 101, 109 (1954). The general rule, especially in conspiracy cases, is that persons jointly indicted should be tried together and that severance should not be granted absent a showing of the most compelling prejudice, *United States v. Perez,* 489 F.2d 51, 65 (5th Cir. 1973). Here, appellant has made no showing of such prejudice. Appellant complains that denial of his motion prevented Ponsoldt from testifying in his behalf. However, upon Ponsoldt's acquittal he was subject to subpoena and appellant had the opportunity to have him properly served. He failed to act until Ponsoldt was absent. We therefore find no merit in appellant's contention.

VI. Attorney-Client Privilege

Appellant contends that Daniel Cohen should have been barred from testifying against him because of the attorney-client privilege. No attempt to invoke the privilege was made at trial, but prior to trial appellant did file a motion

to exclude Cohen as a witness. The record does not reveal the court's ruling on this motion, but since Cohen was allowed to testify the motion apparently was denied.

In order to invoke the attorney-client privilege the claimant must establish the following elements:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [the] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

In re Grand Jury Proceeding, 517 F.2d 666, 670 (5th Cir. 1975), *quoting United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-59 (D.Mass.1950). The burden of proof is on the individual asserting the privilege to demonstrate an attorney-client relationship. C. McCormick Evidence, § 88, p. 179 (Cleary ed. 1972). Here, we find that appellant Kelly has not met this burden.

It is true that Cohen testified that he was a member of the New York Bar (R. 1279) and was employed as an attorney by AFCA. (R. 1279, 1282). However, beyond these facts no evidence has been presented by appellant of any attorney-client relationship between appellant and Cohen. As the government points out in its brief, when Cohen took the stand appellant could have examined him on the attorney-client issue but failed to do so. The trial judge, therefore did not err in permitting Cohen's testimony.

VII. Failure to Grant a Mistrial

On two separate occasions appellant's counsel moved for a mistrial on the grounds that the prosecution had placed appellant's character in issue. The motions were denied and appellant now asserts the denial of those motions was error.

Appellant's initial motion on this ground arose out of the following question asked by the prosecution on redirect of its witness Eric Gaeckler.

> Could Mr. Kelly have sold AFCA stock in the United States without proper authority and you simply not have known about it? (R. 729-30).

Appellant's counsel made an objection to this question, as calling for an opinion. The objection was sustained and counsel then asked the court to instruct the jury to disregard the question. The court replied:

> Well, I think the jury understand that if I sustain an objection, there has been, in fact, no question and no answer. (R. 730).

Appellant then moved for a mistrial on the grounds that the government stated that appellant had committed the illegal act of selling AFCA shares in the United States.

We first note that the government's question does not state that Kelly committed the illegal act but merely asks the witness if Kelly could have committed it without his knowledge. Secondly we note that appellant's counsel explored this issue on cross-examination of Gaeckler.

> Q. To the best of your knowledge, was any attempt made to sell stock in the United States?
> A. I don't think so. I don't know it.
>
> Q. In fact, there was no attempt made to sell any stock of AFCA in the United States; isn't that a fact?
> A. Yes.

> Q. Isn't it a fact that Mr. Kelly never sold any stock whatsoever of AFCA. . . . in the United States?
> A. Not in the United States.
>
> • • • • • •
>
> Q. [I]sn't it illegal to trade stock in the United States that is not registered?
> A. That's correct.

(R. 686-87). Finally, we believe that whatever prejudicial effect appellant imagines the prosecution's question had on his case was cured by the court's reply to defense counsel's request that the court instruct the jury to disregard the question.

Appellant's second allegation of prosecutorial, misconduct is even more frivolous than his first. In that instance the prosecutor stated: "We will stipulate that [the government's chief witness] Mr. Schreiber is the kind of person who would become involved in a fraud." (R. 1724). At defense counsel's request the court instructed the jury to disregard the prosecutor's comment. Defense counsel then moved for a mistrial which motion the court denied. The trial judge later expressed his surprise at this motion for a mistrial because, "I thought . . . isn't that what you are trying to prove, that he [Schreiber] was a phony? We concur in the lower court's surprise at this motion, and are further surprised that this issue, which we find wholly without merit, should be raised on appeal.

VIII. Failure to Comply with Discovery Order

The government inadvertently failed to supply appellant with a copy of a document it had decided to introduce at trial, although Ponsoldt's counsel had requested and was provided with a copy. When this oversight was brought to the government's attention, appellant's counsel was given a copy. On counsel's objection, however, the court prohibited the government from placing the document into

evidence. We fail to see, and appellant gives no reasons, how he was prejudiced by a document which the court refused to allow the government to introduce into evidence.

The judgment is AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 75-341-Cr-PF

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

HARRY NEIL KELLY, *Defendant*.

May 26, 1978

ORDER OF MODIFICATION ON MANDATE

THIS CAUSE having come before the Court on a Motion to Modify Order on Mandate wherein the Defendant has moved the Court to modify its Order on the Mandate, directing the Defendant, HARRY NEIL KELLY, to surrender himself to the United States Marshal for the District of Washington, D.C. on or before 9:30 o'clock A.M. on the 30th day of May, 1978, to begin serving the sentence imposed by this Court on April 8, 1976, and there appearing to be good cause for modification of the Court's Order, it is

ORDERED AND ADJUDGED that the time and date referred to above be and it is hereby extended to 9:30 o'clock A.M. on the 1st day of June, 1978. Except as herein modified, the Court's May 19, 1978 Order on the Mandate shall remain in full force and effect.

DONE AND ORDERED at Miami, Florida this 26 day of May, 1978.

/s/ PETER T. FAY
United States District Judge

cc: U.S. Attorney
U.S. Marshal
Chief Probation Officer
Harry Neil Kelly, 4809 Bending Lane, Washington, D.C. 20007
Harold C. Knecht, Jr., Esq.

APPENDIX E

[Title Omitted in Printing]

May 31, 1978

ORDER STAYING MANDATE

THIS CAUSE having come before the Court on Defendant's Motion to Stay Enforcement of Mandate Pending Certiorari to the United States Supreme Court, wherein the Defendant has moved the Court to stay its Order on the Mandate entered on May 26, 1978, directing the Defendant, HARRY NEIL KELLY, to surrender himself to the United States Marshal for the District of Washington, D.C. on or before 9:30 o'clock A.M. on the 1st day of June, 1978, and the Court having considered said motion, it is

ORDERED AND ADJUDGED that this Court's Order on the Mandate entered on May 19, 1978 and modified on May 26, 1978 be and it is hereby stayed pending notification from the Clerk of the Supreme Court that a Petition for Writ of Certiorari has been filed in that Court, and thereafter until final disposition by Order of the Supreme Court.

DONE AND ORDERED at Miami, Florida this 31st day of May, 1978.

/s/ PETER T. FAY
United States District Judge
(By Designation)

cc: U.S. Attorney
U.S. Marshal
Chief Probation Officer
Harry Neil Kelly, 4809 Bending Lane, Washington, D.C. 20007
Harold C. Knecht, Jr., Esq.

Supreme Court, U. S.
FILED
JUN 23 1978
MICHAEL RODAK, JR., CLERK

No. 77-1716

In the Supreme Court of the United States

OCTOBER TERM, 1977

HARRY NEIL KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1716

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court abused its discretion in denying his motion for a mid-trial continuance and that the evidence was insufficient to support the verdict.

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on two counts of causing a person to travel in interstate commerce in execution of a scheme to defraud, in violation of 18 U.S.C. 2314 and 2, and conspiracy to commit that offense, in violation of 18 U.S.C. 371. He was sentenced to a concurrent term of three years' imprisonment on each count. The court of appeals affirmed.

Contrary to Rule 23(1)(i) of the Rules of this Court, the petition for a writ of certiorari in this case does not include a copy of the opinion of the court of appeals. That opinion, which is reported at 569 F. 2d 928, contains a detailed summary of the evidence underlying petitioner's offenses and completely rebuts each of the claims presented in the petition. We rely on the court of appeals' opinion in urging that the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1978.

DOJ-1978-06